Supreme Court, U.S.
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NO. 04 135

IN THE
SUPREME COURT OF UNITED STATES
JULY TERM, 2004

GEORGE FOTIADES
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the information provided in the affidavit of probable cause, under the totality of circumstances test, supported the reliability of this information?

II. Whether the information provided in the affidavit of probable cause, even if reliable, was stale?

LIST OF ALL PARTIES

The parties in the Supreme Court of Pennsylvania were:

Petitioner, George Fotiades, appellant in Superior Court of Pennsylvania, and currently Petitioner presently before the Court.

Appellee, Commonwealth of Pennsylvania.

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OPINION BELOW

On January 15, 2003, the Superior Court of Pennsylvania affirmed the judgment of conviction for possession with intent to deliver a controlled substance and conspiracy. On April 6, 2004, Petitioner's Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is pursuant to Title 28 U.S.C. Section 1254(1). The opinion issued by the Superior Court of Pennsylvania and the Order denying the Petitioner's Petition for Allowance of Appeal are attached as Appendix A and B respectively.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that his rights under the Fourth Amendment of the United States Constitution were violated.

STATEMENT OF THE CASE

On October 15, 1999, Appellant was arrested and charged with possession with intent to deliver a controlled substance 35 Pa.C.S.A. Section 780-113(a)(30), possession of a controlled substance 35 Pa.C.S.A. Section 780-113(a)(16), and possession of drug paraphernalia 35 Pa.C.S.A. Section 780-113(a)(32).

Defendant filed an omnibus pre-trial motion seeking suppression of all evidence obtained pursuant to the warrant. After a hearing the motion was denied by the trial court. Following a bench trial, the defendant was found guilty of all charges and sentenced to a term of imprisonment of 5 to 10 years.

STATEMENT OF THE FACTS

On October 15, 1999, Sergeant Boudwin prepared an affidavit of probable cause for a search warrant for the appellant's residence at 1409 13th Street, Eddystone, Delaware County, PA. At approximately 6:40 p.m., members of the Delaware County CID Drug Task Force and the Chester Police Department executed the search warrant at that location. As a result of the search, police confiscated approximately $1,400.00, packaging materials, and a large amount of handguns, rifles, and ammunition.

Defendant challenged the probable cause set forth in the affidavit supporting the search warrant. A review of the facts set forth in the search warrant is necessary for the resolution of these issues.

The affiant, relies on three sources of information in preparation of the affidavit of probable cause - confidential informant #1, confidential informant #2, and a colleague, Detective Mucker. The affidavit begins with the assertion that during the month of December 1998, the affiant was contacted by a reliable confidential informant, hereafter referred to as CI1. It goes on to vouch for the reliability of CI1 without providing any details regarding the information the informant had provided previously. The affidavit goes on to say that CI1 has provided information that has led to the issuance of search warrants in regards to various drug act violations. As a consequence of the execution of these warrants they recovered drugs and drug paraphernalia as indicated by CI1. Finally, it asserts the CI1 has provided information to the detective which led to the arrest of at least five persons for drug violations. No where in the affidavit does it indicate when, where, which jurisdiction, the number of cases that led to convictions, the names of the people arrested, or the identity of the detectives CI1 provided information to. CI1 indicated that he has purchased meth and cocaine from appellant on numerous occasions while inside that location. There is absolutely no reference to any time frame except that CI1 informed the affiant in December 1998 of these facts and that he has seen drugs inside his residence in the past six months.

The second source of information according to the affiant was a confidential informant, hereafter referred to CI2. Once again as with CI1, the affiant states that CI2 is reliable without any facts to support this assertion of reliability. The affiant asserts that CI2 has provided information that has led to the issuance of two arrest warrants, but once again, does not indicate any dates of arrest, any specific cases, case numbers, or the names of

individuals arrested or convicted as a result of CI2's information. The affiant further asserts that in September 1999, he was contacted by CI2 and was advised that appellant was and has been dealing quantities of methamphetamine from his residence. He further asserts that the CI2 had known the appellant for some time and had been purchasing methamphetamine from the appellant for several years. In addition, CI2 has been present on several occasions inside his residence when he observed a 1/4 pound of methamphetamine. Without any reference to a time frame, he further asserts that he has through personal observation and conversation known appellant to purchase or obtain 4 or more ounces of meth on many occasions over the past several years, and that he has been inside his residence and other locations in Delaware County and observed him sell meth to others. He further states that based on conversations with the appellant and through personal observations that appellant removed the meth from his apartment to either one of two vehicles, both Cadillacs, one cream colored and the other black, that appellant has parked behind his residence and sometimes he stores meth in the garage behind his apartment. CI2 states that he has seen on several occasions, once again no time frame referenced, appellant leave through the back of his residence and return a short time later to deliver quantities of meth directly to CI2. He further indicates the appellant is afraid of being arrested and therefore will not deal with anyone he does not know and he will move the meth from the rear of his home to the cars in the back to avoid detection by the police. The only reference to any relevant time frame is in the second to last paragraph in the affidavit of probable cause. In the affidavit, the affiant asserts that within 48-hours from the time of the application of the warrant, CI2 contacted the affiant and

relayed the following: CI2 states that within the last 48 hours, CI2 was with other persons who CI2 knows through experience to be meth users as he has ingested meth with these people on numerous occasions in the past. While with these people within, 48-hours from the time of the application of the search warrant, CI2 had the occasion to ingest meth. During this time CI2 was ingesting meth with these people, CI2 was told that they had just purchased the meth from appellant while inside his residence. During the course of this conversation with these meth users, CI2 learned that appellant was acting suspicious and went outside before coming back inside to make sells to these meth customers.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for the following reason:

PETITIONER WAS DEPRIVED OF HIS RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourth Amendment says that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be involved. U.S. Constitution, Amendment 4.

I. THE INFORMATION PROVIDED IN THE AFFIDAVIT OF PROBABLE CAUSE, UNDER THE TOTALITY OF CIRCUMSTANCES TEST DID NOT SUPPORT THE RELIABILITY OF THE INFORMATION.

The affidavit in support of the search warrant in this case was lacking in sufficient information to establish probable cause for the search of Petitioner's house. Not so cleverly disguised in four pages of worthless verbiage is the fact that the information necessary to justify a search of petitioner's residence is simply not contained within the four corners of the affidavit. There are three sources of information, each one equally and inherently flawed, the accounts provided by the confidential informants fail to provide any time frame for their direct observations other than references to various drug activities over a period of months and years. No specific dates were connected to any specific drug activity. The third source of information, Detective Mucker provided false information regarding a petitioner's arrest eight years before, information that according to the lower court had no bearing on the question of probable cause. The fact that the lower court concluded that false information was provided calls into the question the veracity of the averment made by the affiant regarding the reliability of both confidential informants. Devoid of specific information enshrouded by material misstatement offered by law enforcement officials mandates that this affidavit be closely scrutinized by this Honorable Court. A careful examination of the lack of information provided in this affidavit viewed within the framework of the current case law reveals that the lower court erred in denying petitioner's omnibus motion to suppress.

It is the duty of the court reviewing an issuing authority's probable cause determination to ensure that the magistrate had a substantial basis for concluding that probable cause existed in so doing the reviewing court must accord deference to the issuing authority's post-conviction determination and must view the information

offered to establish probable cause in a common sense non-technical manner.

A search warrant must set forth particular facts and circumstances underlying the existence of probable cause in order for a magistrate to make independent evaluation of the matter. If an informant's tip is the source of information, the affiant must relate some of the underlying circumstances from which the officer concluded that informant was credible or his information reliable. Frank v. Delaware, 98 S. Ct. 2674 (1978) The proper test for determining whether the information provided in support of probable cause is the totality of circumstances test. This standard finds its roots in the opinion of the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Sufficient information must be presented to the magistrate to allow him/her to determine if there is probable cause for the issuance of the search warrant. The magistrate's actions cannot be just a mere ratification of the conclusion of police officials. The totality of circumstances test still requires that the magistrate and the reviewing court examine the reliability of the informant's information. Two years following the decision in Gates, the Pennsylvania Supreme Court adopted the totality of the circumstances test when evaluating the reliability of an informant's information under Article I Section 8 of the Pennsylvania Constitution. Commonwealth v. Gray, 503 A.2d 521 (Pa.1985). The totality of circumstances test is the same whether it is used for determining the existence of probable cause for a magistrate's issuance of a search warrant or a police officer's determination that a warrantless arrest is justified. An officer cannot obtain a warrant based on a "bare bones" affidavit. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984).

a. RELIABILITY OF THE INFORMANTS AS A CONDITION OF PROBABLE CAUSE WAS NOT ESTABLISHED.

When reviewing the rulings of a suppression court, the court must determine whether the record supports the court's factual findings. As long as the record supports the findings of the suppression court, we are bound by the facts and we review only if the legal conclusions drawn therefrom are in error. The defendant argued that he Superior Court's decision denying the motion to suppress erodes the totality of the circumstances test by condoning the finding of probable cause based solely on the bare assertion of a confidential informant. Information provided to the police was limited to the description of a person matching the petitioner's description and a location. The CI provided no information as to when the informant saw the drugs on Petitioner or if he/she observed any drug transactions. The Court held that this was insufficient under both the Fourth Amendment and the Article I Section 8 of the Pennsylvania Constitution. When an officer's actions resulted from information gleaned from an informant in determining whether there is probable cause, the informant's veracity and reliability and basis of knowledge must be assessed. The past reliability of the informant must be established by objective facts in the affidavit of probable cause. The rule is clear, where the police are acting solely on the bases of an informant's tip and the reliability of the confidential informant is not established by objective facts, it is essential that the tip provided adequate

indication that the informant had actual knowledge that the criminal conduct is occurring at the time of the warrantless arrest.

Nowhere in the affidavit in the case at bar is there anything to substantiate the reliability of these two confidential informant. With the presumed effort by the affiant, Agent Boudwin, to discuss and investigate this case with the alleged confidential informants and Detective Mucker, over a period of ten months it is incomprehensible that he would not include the specific cases, case numbers, and names of defendants that the informant's information had revealed. Either the informants do not exist and therefore Detective Boudwin could not provide this information or he simply decided that he could get away with bold assertions of reliability without more detail. Either way the magistrate was left to speculate as to the reliability of the information. Both the Fourth Amendment of the United States Constitution and the Article I Section 8 of the Pennsylvania Constitution mandate much more in order to establish probable cause for a search warrant. A reviewing court cannot presume that reliability exists without facts to establish such a claim. On this ground alone, the search warrant in this case fails to meet the Constitutional standard of the Fourth Amendment.

b. THE BASIS OF KNOWLEDGE THAT IS THE INFORMATION PROVIDED BY THE INFORMANTS WAS NOT SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

The task of the magistrate is to decide whether given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of the person supplying hearsay information, there is a fair probability that contraband or evidence of a crime were found at a particular place. Where the tip provides no basis of the anonymous source a strong showing of the reliability of the information is required. Following Illinois v. Gates, supra, the dual basis of knowledge and veracity are still very much a part of the probable cause analysis. What has changed is the manner in which the magistrate evaluates the affidavit of probable cause. Each of these prongs must be satisfied as a prerequisite to a finding of probable cause. Statements outlining criminal activity within the four corners of the warrant must reference a specific time period in which the alleged criminal activity has occurred so that such activity has a reasonable temporal connection to the issuance of the warrant.

In the case at the bar the only information with a time reference alleging criminal conduct, even remotely connected to the issuance of the warrant, was submitted as hearsay upon hearsay by CI2. A careful review of the relevant caselaw establishes that this simply cannot support probable cause for a search. Although an affidavit which contains hearsay upon hearsay need not be categorically rejected, it must be carefully evaluated in conjunction with the other information in order to determine whether the information is reliable.

The entire affidavit in the case at bar provided nothing more than window dressing in an attempt to disguise the lack of current reliable information regarding petitioner's alleged drug dealing. The information from CI1 was provided in December 1998 about events

occurring on undisclosed dates going back years. The one statement regarding events connected to petitioner's address indicated unspecified acts occurring within the past six months. Suspiciously, CI2 offers the same identical information profile as the one attributed to CI1. There is absolutely no information indicating that petitioner was involved in any criminal activity at the time of the warrant. The only information indicating that petitioner was recently involved in criminal activity was the hearsay upon hearsay indicating that unknown unnamed drug addicts told CI2 that within two weeks of the issuance of the warrant "they" purchased methamphetamine from Petitioner.

II. THE INFORMATION PROVIDED IN THE AFFIDAVIT OF PROBABLE CAUSE, EVEN IF RELIABLE WAS STALE.

A review of the affidavit of probable cause in support of a search warrant reveals that the only time frame that would indicate fresh information in the affidavit of probable cause was allegedly relayed to the affiant by CI2. This information was received by CI2 from drug users within 48 hours of the issuance of the warrant. The anonymous drug addicted tipster indicated that they purchased methamphetamine from the petitioner. There is absolutely no reference to what recently meant to this tipster. Additionally, this information is completely lacking in reliability as there is no attempt to legitimize the source of the information. Besides the fact that it is double hearsay, the averment that the source of the information was from drug users makes it further suspect. Other than this wholly unreliable double hearsay the

affidavit of probable cause contains no time frame either remotely connected to the issuance of a warrant. CI1 references alleged drug dealing on unspecified dates over the last several years. CI1 then allegedly relates to the affiant that during the last six months from the time of the application of the search warrant, he has been inside of petitioner's residence and observed what he knows to be methamphetamine. CI2 allegedly contacts affiant in September 1999 and relays that he has purchased methamphetamine from the petitioner for several years and that he has been inside his residence several times where he observed methamphetamine. No time frame with respect to any of his personal direct observations regarding the petitioner's drug dealings is specified. In Commonwealth v. Shaw, 281 A.2d 897 (Pa. 1971), the Pennsylvania Supreme Court adapted the Supreme Court's holding in Sgro v. United States, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed 260 (1932). The proof of facts have to be so clearly related to the time of the issuance of the warrant as to justify the finding of probable cause at that time. In Shaw, the court ruled that if the issuing officer is provided with evidence to criminal activity at some prior time, this will not support the finding of probable cause from the date of the warrant unless there is a clear showing of criminal activity continued up to or on about the issuance of the warrant. The Pennsylvania Supreme Court has found that when the criminal activity occurred over a month prior to the issuance of the warrant the information was considered stale and therefore lacking in probable cause. Commonwealth v. Eazer, 312 A.2d 398 (Pa. 1973). Additionally, the Court held that a 61 day hiatus between the criminal activity and the issuance of the warrant was too long to support a finding of probable

cause where there was no evidence of continuing criminal activity.

Commonwealth v. Novak, 335 A.2d 773 (Pa. Super 1975), the Superior Court ruled that the affidavit containing language that the informant had purchased drugs more than a dozen times within the past tow months did not establish probable cause for the issuance of the search warrant. Such a statement in the affidavit requires the court to make an assumption as to when the transactions occurred. For the purpose of determining probable cause for the issuance of a warrant, it must be assumed that the transactions took place during the most remote part of the time period set forth in the affidavit. In Novak, the affidavit set forth no specific dates when the alleged purchases.

Where the affidavit is absolutely silent as to the time line of events, there is no way a magistrate can determine within the four corners of the warrant whether the information was fresh or stale.

In this case the information in the affidavit reads as if the events occurring in the affidavit could have occurred now as to opposed to several years ago when the affidavit was prepared. This is the fatal flaw in this case. Evidence gathered in the 10 to 18 days prior to the issuance of a warrant without any indication of continued criminal activity was ongoing would be insufficient to establish probable cause at the time of the anticipated drug transaction.

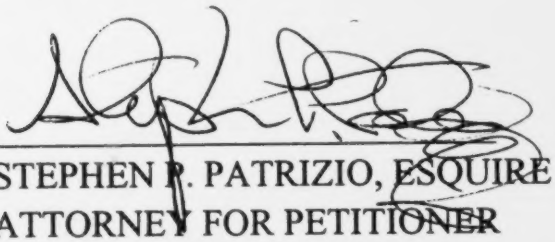
In the case at bar there is absolutely no specific information connecting the alleged drug activity to current criminal activity at the time the warrant was issued. All it contains are broad references to periods of time over the last several years and within the last six months.

In this case it would be absurd to hold that the scant references to unspecified dates over a period years meets the criteria of fresh information. Under the standard set forth by all the precedents cited this information provided in the affidavit of probable cause regarding criminal activity was stale. As such the trial court erred in denying Petitioner's omnibus motion to suppress on this ground as well.

CONCLUSION

For the forgoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,



STEPHEN P. PATRIZIO, ESQUIRE
ATTORNEY FOR PETITIONER

J.A42036/O2

COMMONWEALTH OF PENNSYLVANIA, Appelle	: IN THE SUPERIOR COURT : OF PENNSYLVANIA
v.	:
GEORGE FOTIADES, Appellant	: No. 1571 EDA 2001

Appeal from the Judgment of Sentence in the Court of Common Pleas of Delaware County, Criminal Division, No. 99-4625

BEFORE: MCEWEN, P.J.E., BOWES and TAMILIA, JJ.

MEMORANDUM: **FILED JANUARY 15, 2003**

George Fotiades appeals from the April 20, 2001 five (5) to ten (10) year judgment of sentence imposed after he was found guilty, nonjury, of possession of a controlled substance,[1] possession with the intent to deliver (PWID)[2] and possession of paraphernalia.[3] Based upon information provided by confidential informants (CIs) and appellant's criminal history of possessing controlled substances, a search warrant was executed at appellant's residence on October 15, 1999, and officers seized one pound of methamphetamine (meth), $1,402 in cash, a scale, bagging materials and multiple weapons.

1 35P.S.§ 780-113(a)(16).

2 *Id.*, § 780-113(a)(30).

3 *Id.*, § 780-113(a)(32).

Appellant contends that under the totality of the circumstances, the affidavit of probable cause utilized to obtain the search warrant in question was legally deficient. Appellant argues the affidavit lacked information regarding the reliability of the two CIs upon whose statements the affiant relied in his attempt to secure the search warrant. "With bold assertions regarding the past reliability of two separate confidential informants, the affiant officer in this case failed to provide any specific information regarding cases which were brought based on previous information provided by the informants." Appellant's brief at 12. Appellant also argues the evidence provided by the informants was stale; in the alternative, the information provided was insufficient to establish probable cause for the issuance of the warrant.

When considering a challenge to the denial of a motion to suppress, this Court must determine whether the factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. ***Commonwealth v. Moore,*** 805 A.2d 616 (Pa.Super. 2002). This Court's scope of review when considering whether probable cause existed to issue a search warrant is limited primarily to questions of law, and a finding of probable cause "must be based on facts described within the four corners of the affidavit." ***Commonwealth v. Smith,*** 784 A.2d 182, 185 (Pa.Super. 2001), *quoting* ***Commonwealth v. Stamps,*** 493 Pa. 530, 427 A.2d 141, 143 (1981).

> The standard for evaluating whether probable cause exits for the issuance of a search warrant is the same under both the Fourth Amendment and Article I, § 8: "the totality of the circumstances" test set forth in *Illinois v. Gates,* 462 U.S.213, 103 S.Ct. 2317, 76 L.Ed2d 527 (1983). This Court specifically adopted that standard as a matter of Pennsylvania constitutional law in *Commonwealth v. Gray,* 509 Pa. 476, 503 A.2d 921 (1985).... [P]ursuant to the "totality of the circumstances," the task of an issuing authority is "simply to make a practical, common-sense

> decision whether, given all of the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.". *Gray,* 509 Pa. at 484, 503 A.2d at 925 (quoting *Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332). Thus, the totality of the circumstances test "permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Gates*, 462 U.S. at 234, 103 S.Ct. 2317.

Smith, supra at 187. "[T]he reliability of an informant should be established by some objective facts that would enable any court to conclude that the informant was reliable." ***Id.,*** *citing* ***In the Interest of O.A.,*** 552 Pa. 666, 717 A.2d 490 (1998). "[W]here the reliability of the informant is not established, then the facts and circumstances surrounding the tip must provide sufficient indicia of reliability to support a finding of probable cause." ***Id.***

> When police are relying on an informant's tip, it is important that the tip provide information that demonstrates "inside information" a special familiarity with the defendant's affairs. If the tip provides inside information, then police corroboration of this inside information can impart additional reliability to the tip. If the facts that are supplied by the tip itself are no more than those easily obtained, then the fact that police corroborated them is of no moment. It is only where the facts provide inside information, which represent a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause.

Id.

A review of the five-page affidavit of probable cause indicates affiant, Sergeant Michael Boudwin, of the Delaware County Narcotics Unit, relied upon information provided by

two CIs, both of whom wished to remain anonymous. As set forth in the affidavit, affiant averred CI-1 had demonstrated to him, "a thorough familiarity with the ways in which controlled substances, including meth, are processed, prepared, packaged, ingested and distributed as well as the weights and corresponding prices at which controlled substances are commonly sold." Affidavit of Probable Cause at 1, Record No. 1. CI-1 also previously had provided information regarding drug trafficking which was subsequently corroborated, resulting in the execution of three warrants and the arrest and conviction of at least five persons. ***Id.*** at 1-2. During December 1998, CI-1 contacted affiant and advised him he had purchased both meth and cocaine from appellant and, within six months of the time of application for the warrant, had been inside appellant's home where CI-1 observed quantities of meth and cocaine and "several semiautomatic handguns." ***Id.*** at 2. Appellant's possession of a handgun and a quantity of cocaine were confirmed as recently as October 1999, within weeks of date on which the warrant was requested and issued.

CI-2, an admitted user of both meth and cocaine, contacted affiant in September 1999, and also demonstrated a familiarity with and knowledge of the "drug scene" in Delaware County, introducing undercover detectives to those selling controlled substances, resulting in the issuance of at least two arrest warrants. ***Id.*** at 2-3. CI-2 informed affiant that over the past several years he had purchased from and "done" meth with appellant on multiple occasions, and also had' been inside appellant's home where he (CI-2) observed various quantities of meth being sold, and saw several handguns. CI-2 stated appellant sometimes stored meth in his detached garage, and sometimes transported meth in the cream-colored and black Cadillacs parked behind the subject residence. CI-2 also informed affiant that within 48 hours of the application for the warrant, acquaintances had told him appellant sold them meth, which had been secured from outside his residence. Within a week of the warrant application, affiant conducted a mobile

surveillance of the residence and curtilage, and observed the detached garage and Cadillacs referenced. Based on all information gathered, the affiant requested a search warrant. At the August 11, 2000 suppression hearing, affiant testified with regard to his collection of this information, over a ten-month period, leading to the issuance of the search warrant in question.

We agree with the court that the information used to obtain the search warrant was not unduly stale, as it represented a continuing criminal enterprise, with contact with CI-2 as recent as 48 hours prior to the application. **See *Commonwealth v. Sharp,*** 683 A.2d 1219 (Pa. Super. 1996) (holding for a warrant to be constitutionally valid, a finding of probable cause must be based on facts which are closely related in time to the date the warrant is issued); **see also *Commonwealth v. Jones,*** 542 Pa. 418, 426-427, 668 A.2d 114, 118 (1995) (holding staleness will not be determined by "rigorous exactitude," and "a showing that criminal activity is likely to have continued up to the time of the issuance of a warrant renders otherwise stale information viable"). The totality of the circumstances presented supports the issuance of the search warrant based upon the reliable information provided by the two CIs and the corroboration undertaken by the detective and the law enforcement officials.

Judgment of sentence affirmed. Dissenting statement by PJE McEwen.

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GEORGE FOTIADES, Appellant	:	No. 1571 EDA 2001

Appeal from the Judgment of Sentence in the Court of Common Pleas of Delaware County, Criminal Division, No. 99-4625

BEFORE: MCEWEN, P.J.E., BOWES and TAMILIA, JJ.
FILED JANUARY 15, 2003
DISSENTING STATEMENT BY McEWEN, P.J.E.:

While the memorandum of the majority reveals a perceptive and persuasive expression of rationale, I am compelled to this dissent since I am of the view that the magistrate relied upon stale information in issuing the subject search warrant.[1] **See:** ***Commonwealth v. Eazer,*** 455 Pa. 320, 312 A.2d 398 (1973).[2]

[1] The record discloses that the most recent direct contact that police informant "CI *2"* had with the defendant was six months prior to the application for the search warrant. The reliability of the alleged information received in the 48 hours prior to the application for the warrant was not established, since the source was never identified as being a person known to the police.

[2] I am of the mind that the Supreme Court decision in ***Commonwealth v. Jones,*** 542 Pa. 418, 668 A.2d 114 (1995) (Opinion Announcing the Judgment of the Court), is certainly instructive but not controlling since the decision was rendered by a non-precedential plurality opinion. **See:** ***In the Interest of O.A.,*** 552 Pa. 666, 676, 717 A.2d 490, 496 (1998) (Opinion Announcing the Judgment of the Court).

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 290 MAL 2003
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court
GEORGE FOTIADES, Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 6th day of April, 2004, the Petition for Allowance of Appeal is hereby DENIED.